Agricultural Lore

Early Spring 2022 Edition

e-Publication

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Early Spring Edition 2022

Welcome to this early Spring edition of Agricultural Lore.

It is somewhat ironic that on the very day coronavirus restrictions were lifted in England, the Russian invasion of Ukraine drove cart and horses through any hopes we may have of a return to normal commercial life. Whilst the Agriculture industry weathered the covid storm reasonably well, the impact of Russia's actions has immediately been felt on gas, oil and fertiliser prices. Furthermore, with Russia and Ukraine accounting for more than 25% of world wheat trade since 2017, any interruption in this supply, will doubtless have a dramatic effect on world wheat prices.

On a more positive note, domestically, more progress has been made in the transition between the ex-CAP subsidy regime and ELMS, with the publishing of DEFRA's response to the consultation on lump sums and delinked payments. There's more flesh on the bones of the lump sum exit scheme giving food for thought to farmers approaching retirement. But as ever, there are strings attached and any businesses considering taking advantage of this scheme will have to consider the wider picture, including tax consequences (for more details see Launching forward with lump sums and Developments on delinking).

In this edition of Agricultural Lore we explore a wide range of recent legal developments affecting rural landowners and businesses, ranging from the impact a commercial partnership case has on farming partnerships to liability for cow attacks and court guidance on how livestock farmers should assess the risk of an attack.

With the introduction of a new telecoms bill to Parliament last November, the Government is now attempting to address some of the problems arising from the 2017 Electronic Telecommunications Code – we highlight the measures included in the bill.

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Those contemplating sustainable development of land will be well aware of the recent developments in biodiversity gain and conservation covenants, but as Phil Lawrence on page 7 considers, there are other sustainability issues to consider well in advance of the diggers moving in.

Following the winning by Family team leader, Daniel Eames, of the 'International Family Lawyer of the Year' at this year's Family Law Awards, we team up with team member, Sarah Green, who looks at how cohabitation agreements can protect the family farm (see p11).

With a canter through two Agricultural Holdings Act 1986 decisions addressing the outcome if the wrong party is named in proceedings, our Learning the Law slot then considers how to use the phrase "subject to contract" appropriately.

Finally, we end with our early Spring quiz which, as we approach Lady Day, is all about surrenders.

Farming Partnership: Sell up or sell out?

When a partnership is dissolved, commonly the most important question is how the partnership assets will be dealt with. This can be a significant concern where the farm is a partnership asset and one partner wants to keep farming.

The question is usually whether the farm should be sold on the open market or whether a partner's interest should be bought out at a valuation. Invariably these sorts of issues are resolved at mediation, but there are occasions where cases come before the Court.

Malik v Hussain

Malik v Hussain [2021] concerned a restaurant business in Manchester. It may not appear, on the face of it, to have much to do with farming partnerships, but it is a helpful reminder of the approach the Court will take when faced with these circumstances.

The restaurant was partnership property. There was no written partnership agreement. After an unsuccessful mediation, Mr Malik did not want to be bought out by his previous partners. He wanted the property sold on the open market with the partners having liberty to bid.

Partnership Act 1890

Sections 39 and 44 of the Partnership Act 1890 confer a right on each partner, in the event of a dissolution, to have surplus assets shared between them in accordance with their rights as partners. To ensure this is so, the normal rule is that partnership property should be sold so the true value of the asset can be realised. However, this is just the starting point. The Court has a discretion and any other method of settlement may be adopted if it is fair and reasonable.

The Court will look at the facts of the case when it comes to the exercise of its discretion. The concern expressed in this case was that the late change of position by Mr Malik was an attempt by him to engineer a bidding war to increase the price, without having funds to be able to complete on a purchase himself. However, on the other hand, questions were exposed in relation to the valuation process.

Fairness

The Judge found that where the Court is being asked to make a buy-out Order, whether alone or as a fall back to a sale order, a very significant consideration is the fairness of such an outcome. If it transpires on the basis of the evidence and submissions at trial that making a buy-out Order would not achieve a fair outcome, the Court ought not to do so without ensuring, so far as it reasonably can, that any reasonable adjustments necessary to ensure a fair outcome are made.

Decision

In this case the judge ordered there be a sale on the open market, followed by a buyout from the other partners if no sale proceeded. However, he did not think it would be fair and just to allow a wholly unregulated bidding process. Detailed directions were given on the reserve and the consequences if a successful bidder did not have the means to complete the purchase in a specified timetable.

Court's approach

The Judge was not prepared to go so far as to accept a general principle, that there should always be a sale on the open market, if there was ever any risk of the selling partner not getting the best price. However, where the Court has a discretion, judges are less likely to look for binding legal principles and will review all the facts of the case to decide how best to exercise their discretion.

Perhaps the morale of the costly case is to reach agreement at mediation wherever possible in order to avoid the uncertainties of litigation, the open market and valuation.

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Animal Liability: Assessing the risk of cow attacks

Every year a number of ramblers are injured by cattle grazing land crossed by public footpaths. We consider the question of liability for damage and injury and highlight some steps farmers should take to assess and deal with the risk.

The Animals Act 1971

Tortious liability for damage caused by animals is largely governed by the Animals Act 1971 ("AA 1971"). This Act creates a distinction between "dangerous species" and those which are not dangerous species.

Under Section 6(2) a dangerous species is a species: -

a) which is not commonly domesticated in the British Islands; and

b) whose fully grown animals normally have such characteristics that they are likely, unless restrained, to cause severe damage or that any damage they may cause is likely to be severe.

The "type" of species kept is important as it dictates which rules for liability shall apply.

Dangerous species

Where damage is caused by an animal belonging to a dangerous species, the keeper of that animal shall be strictly (ie automatically) liable for any damage caused by it (s2(1), AA 1971). The keeper's knowledge of the animal's characteristics is irrelevant and it is more straightforward to prove liability.

Where damage is caused by an animal not belonging to a dangerous species, the hurdle to establish liability is much higher.

Under section 2(2), the injured person must establish all of the following matters to prove liability against the keeper: -

a) the damage was of a kind which the animal, unless restrained, was likely to cause or if any damage caused was likely to be severe (s2(2)(a)); and

b) the likelihood of the damage or of it being severe was because of characteristics of the animal, which are not normally found in that species or are only found at particular times or circumstances (s2(2)(b)); and

c) the keeper of the animal (or another who was in charge of the animal as per s2(2)) knew of those characteristics (s2(2)(c)).

If all (a) to (c) can be established, then the keeper of the animal shall again be strictly liable.

Whilst liability is strict, there are defences to section 2 which include:-

- where damage was the fault of the person suffering it;
- where the claimant voluntarily accepted the risk of the damage; and
- where the person suffering damage was trespassing (subject to exceptions).

Bathie v Anthony

Bathie v Anthony [2021] is an example of a recent case under section 2(2) of the AA 1971.

Ms Bathie brought a claim under s2(2) (and also in negligence) after she was trampled by Mr Anthony's cow in 2016.

Mr Anthony had cows which grazed land in the Anton Lakes Nature Reserve ("AL") under a licence agreement. AL is fenced around the perimeter and has public footpaths crossing it. The cow in question had been let out to graze earlier in the day of the accident.

Ms Bathie's account is that she was walking her dog on a lead at AL whilst on her mobile phone throughout. During her walk, she saw the cow around 14 feet in front of her. On seeing the cow, she turned around immediately, without engaging it and bent down to rotate her dog's collar. When her back was turned, she was knocked to the ground by the cow and then trampled on, as was her dog; thereby causing injury.

Following the incident, Ms Bathie had spoken with the local authority's parks and countryside manager. According to him, Ms Bathie had said at the time that the dog lead had become tangled with the cow and in trying to pull the dog away she ended up on the floor and was then trampled on by the cow. The judge appeared to accept that it was likely that the dog lead had become entangled.

The Claim

Ms Bathie brought a claim under s2(2), AA 1971 and in negligence.

Mr Anthony accepted that s2(2)(a) was satisfied. The question was whether s2(2)(b) was also satisfied, giving rise to strict liability.

For the negligence claim, Ms Bathie claimed that Mr Anthony was negligent in grazing his herd in a field, which he knew the public walked across, with and without dogs. She claimed that:-

- there should have been an electric fence to separate the herd; and
- the signage was inadequate to warn the public of the presence of the herd at AL.

Evidence

Whilst the judge considered the expert's evidence to be of limited use, the judgment notes that it was agreed between them that:-

- All the cows would have been a little more anxious due to being transported to AL that day;
- It is likely that the cow was seeking water from the trough and that was the reason it was away from the herd;
- The cow was unlikely to be in full fight or flight mode and was not demonstrating full-blown fear state;
- The cow would have been anxious and instinctively wanted to return to the herd; and
- As Ms Bathie approached the cow, it would have turned to face a potential threat.

The judge also considered the breed of cattle used by Mr Anthony to graze AL to be "docile".

Decision

S2(2) – Noting the above (and other factors), the judge found that s2(2)(b) had not been proved in this case and thus Mr Anthony was not strictly liable.

The judge considered the various scenarios and formed the view that a cow acting "inquisitively… would not arise from a characteristic that attracts strict liability under s2(2)(b)".

He considered it to be a "normal characteristic of a cow, not one that only arises at a particular time or in particular circumstances".

He made similar comments regarding the act of a cow returning to the rest of a herd after drinking water from a trough.

The judge also highlighted that where a cow, whose initial anxiety was allayed, returned to the herd normally with her head up, but not seeing Ms Bathie, caused her injury, this would not satisfy s2(2)(b).

Ms Bathie's case was broadly that the cow, whether through aggression or anxiety, tried to return to the herd and safety, ignoring any obstacles in its path (including Ms Bathie whom it trampled). The judge found no evidence to support this assertion.

Negligence

Noting factors such as the cows being docile and public safety concerns with electric fences, the judge rejected the need for such a fence. In terms of the issue of signage, the judge rejected Ms Bathie's account and accepted that there was appropriate signage, which Ms Bathie simply missed (due to being on her phone). Had she read the sign, she would not have entered AL. The judge did not therefore accept Ms Bathie's claim in negligence. Accordingly, Ms Bathie's entire claim failed.

Comment

Whilst the animal liability offences discussed in this article are strict, the Bathie case makes it clear that a claimant will not automatically be successful under s2(2) AA 1971 upon suffering damage. Where the animal concerned is "non-dangerous" (under the Act), the claimant will still have to establish the three limbs of s2(2). The hurdles are not so high where the animal concerned is a dangerous species.

So, what steps can farmers take to protect the public and themselves from danger?

- Find out which category the animals fall within – if they are from a "dangerous species", take action to keep them away from public footpaths or access areas.
- If not from a "dangerous species", know the animals well
- If a farmer considers they pose or might pose a risk to the public, risk assessments and safety precautions should be taken.
- Consider erecting signage, fencing off footpaths, separate housing and installing CCTV. This will not only help avoid incidents which fall under section 2 of the AA 1971, but will also help protect against a negligence claim.

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Telecoms: Another tip of the scales in favour of operators

The Electronic Communications Code ("Code") which came into force on 28 December 2017 has been subject of extensive criticism from landowners and operators alike and has resulted in numerous disputes, which have passed through the courts. So, following consultation in early 2021, a series of amendments has been proposed, which will be implemented by Part II of the Product Security and Telecommunications Infrastructure Bill, introduced to Parliament on 24 November 2021.

Obviously, there is plenty of opportunity for amendment to the Bill as it passes through the Houses of Parliament. However, the current draft provides a good indication of the direction of travel. We consider the key points of note for landowners and highlight action they may wish to take.

Existing operator occupiers

Operators who are already in occupation of land, but are unable to require a new code agreement, will be permitted to acquire a new agreement.

There is some concern that on the current drafting an operator will be able to request a new code agreement, even if it is still within the term of an existing code agreement, or if no code agreement ever existed. However, this would directly contradict the Government's stated intention that operators should not be able to modify ongoing code agreements, so it remains to be seen how this will be affected.

Alternative dispute resolution

Operators will be under a duty to consider using Alternative Dispute Resolution (ADR) before making an application to the court to settle any disputes and will have an obligation to make landowners aware that ADR is available as an option. However, there is no requirement on the parties to use ADR and whilst the courts can consider a refusal to engage in ADR on the question of costs, there is a real risk that operators will use the possibility of ADR to cause delays, rather than facilitate agreement.

Upgrading and sharing apparatus

There will be an automatic right for the operator to upgrade its apparatus and share with other providers, so long as it will have no adverse impact/no more than a minimal adverse impact on the appearance of the apparatus and will impose no additional burden on the landowner.

Code rights where a landowner does not respond to an operator

Under a new process, operators will be able to obtain Code rights for a maximum period of 6 years, where they can demonstrate that they have made reasonable efforts to agree Code rights but have received no response from the landowner. The process can be halted by a landowner engaging with the operator before an order is made, and a landowner will be able to apply for compensation at a later date if any loss or damage is caused by the operator exercising their rights.

Conclusion

Following the consultation, landowners would not have been expecting any major shift in their favour, but will nevertheless be disappointed, that the Government did not revisit the current valuation framework under the Code, which has resulted in significantly lower rents. Indeed, the Government has stated it has no intention of doing so.

Given the amendments will assist existing operator occupiers, particularly those in occupation under an expired agreement with no right to renew, landowners who wish to seek possession of a site would be well advised to take action before this Bill becomes law and the operators are given enhanced rights. It would also be prudent for landowners in negotiations with Telecoms providers now to review whether they want to push matters forward more quickly so that any agreement is concluded before the new provisions take effect.

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Development: Sustainability in developing land

Over the last six months DEFRA has released more information on how the Sustainable Farming Incentive (SFI) will work as one of the three new environmental land management (ELM) schemes. Whilst there is a lot of detail still to be settled around the ELM schemes what does seem clear is that delivering 'sustainable' environmental improvements is high up the Government's agenda. In this article we consider how that can link with the development of land.

Environment Act 2021

The Environment Act 2021 provides further detail on the interaction between the planning system and wider biodiversity protection. Developers and planners now typically have detailed pre-application discussions focussed on sustainability for both houses and commercial buildings.

Sustainable development here includes saving occupiers' energy costs, attracting people to live or work in a given area and mitigating the risk of building obsolescence, such as not being able to obtain a good energy performance certificate. This chimes with most end buyers of developments wanting to buy into something that meets sustainability criteria.

Issues to consider

Some points to consider on sustainable development include:-

1. Available mitigation land:

Biodiversity net gain is already a planning requirement in some areas of the UK and is covered in the Environment Act 2021. Developers will increasingly need to provide formal plans for biodiversity net gain. With biodiversity in mind, a native tree planting scheme or a new area of pollen and nectar-rich wildflowers might be looked for.

That does not necessarily have to be on the land picked to develop. There is a concept for off-site habitat creation, which could be separate from any main development land. So, it is worth landowners thinking holistically and considering whether there are opportunities to maximise biodiversity across their land?

2. Conservation covenants:

The recent guidance indicates that offsite biodiversity gain must be maintained for at least 30 years (after the completion of the works to create or enhance the habitat - although this time period may be subject to change).

To aid enforcement of these obligations the Environment Act 2021 provides for the introduction of "conservation covenants" as a new legal structure, which can be enforced. Although not yet introduced, once they are, they will be registrable as local land charges. This means they will bind the land-owners successors to the terms of the agreed biodiversity enhancements.

3. Irreplaceable habitats:

Often planning conditions can be imposed in relation to existing habitats. There is a biodiversity focus on irreplaceable habitats. These are areas which have such a high value in biodiversity terms, and which are so difficult to create, that their loss would mean that meeting biodiversity net gain objectives could be impossible, for any development of those areas. It is useful for landowners to identify if they have any such areas of land. There are also benefits to monitoring biodiversity outcomes in detail now, as this can help to inform habitat management in the future.

4. Sustainable energy:

There is increasing use of ground source heat pumps for sustainable buildings. This can include a ground loop - as a pipe buried underground. Is there land (or even a lake/pond) nearby to a development site that could allow installation of a ground source heat pump loop? That could be a low impact way to increase sustainable energy overall. It can be important to then think about the land ownership and rights of way that might be involved.

5. Use of natural drainage:

Developing sustainable drainage - based on long knowledge of the most efficient water use on the land - is increasingly valued. This could extend to the best way to capture rainwater, create an attenuation pond or deal with flood risk in some cases.

Thinking about efficient water use on land can help with sustainability in the future, especially when it feeds through to reducing the water use intensity of properties that are then developed.

6. Heat islands:

Heat islands are often used to refer to pockets of heat formed on land by weather and geography. If such conditions exist or result from factors on land, the landowner is most likely to have noticed this and be able to flag this to developers. This can then help designers to layout sustainable landscape and orientate future buildings to capitalise on passive heating or cooling. It can then be important to think about any rights of light that might be involved or affected, particularly by a large scheme of development.

7. Soil standards:

The SFI included detailed reference to soil standards and highlights soils as one of the most important natural assets there is. Knowledge of the soil on an area of land can cross over into many areas and can boost the sustainability of development.

An important part of many sustainable developments can be to reduce site disturbance and soil erosion during construction phase. It can be important where farming activity is continuing nearby that the legal arrangements for any development take this into account and minimise any adverse impact on the soil.

8. Locally reclaimed materials:

This can increase the sustainability credentials for a development. Do landowners have resources on their land that could be reclaimed to maximise the sustainable use of resources in a development. This could be waste materials, salvaged or recycled materials that can be earmarked, subject to legal checks, to be used as reclaimed materials. Waste not, want not is an old expression; maybe sustainability as a concept is not as new as all that after all!

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Agricultural Holdings Act 1986: Naming the wrong party

There have been two court decisions regarding tenancies under Agricultural Holdings Act 1986; the first looked at whether the failure to name a landlord correctly in a succession application invalidated the application; the second considered whether a notice to quit was valid where it was served on a former tenant by a landlord who was unaware that the tenancy had been assigned.

The wrong landlord

A recent Upper Tribunal (UT) decision in *Adams v Thomas* [2021] has looked at the consequences of an applicant naming an incorrect party as landlord on an application for succession under Part IV of the Agricultural Holdings Act 1986 (AHA 1986). The Tribunal decided that this was not fatal to the application.

The case

The applicant's agent had named Mr Adams as the landlord on the application however, the correct landlord was actually a company - Adams DSB Ltd, of which the sole director was the named Mr Adams. The Agricultural Land Tribunal (ALT) decided in the first instance that this mistake was not fatal to the application and consequently substituted the company as respondent. This substitution occurred after the three-month time limit had passed for the succession application to be made. This decision was appealed.

The appeal

The UT looked at two questions: first, whether there is a statutory requirement which requires the landlord to be correctly identified and secondly, whether the ALT had been correct in substituting the correct name of the landlord after the time limit had passed. The UT dismissed the appeal and held that naming the incorrect landlord is not fatal to the validity of an application and that the ALT had been right to correct this error after the expiry of the time limit.

An analysis of the statutory regime concluded that there is no provision in the AHA 1986, which requires the landlord to be named in the application. Although there is a requirement for this in the Agricultural Land Tribunals (Rules) Order 2007, these rules were obviously not in force when the AHA 1986 was drafted.

When considering the significance of what is at stake for an applicant, making an application under Part IV of the AHA 1986, the UT considered that it would not have been Parliament's intention to require the landlord to be correctly identified in an application under section 39 AHA 1986. They recognised that there may be certain practical difficulties in ascertaining the landlord's identity with rural tenancies e.g., unregistered land, the transfer of land within families or the land being vested in a family-owned company or trust, without the knowledge of the tenant.

Consequences

This decision does not mean that the UT considered that correctly identifying the landlord on the application was unimportant or trivial. It was suggested that in all probability a misidentified landlord would become aware of the proceedings and would be able to make representations to the Tribunal and be added as a party.

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The wrong tenant

Is the recent County Court decision of *Turner v Thomas* [2021] cause for concern for tenants holding undisclosed assignments in their chest of armoury?

The assignment of a tenancy to a company is a common weapon deployed by tenants under the Agricultural Holding Act 1986 ("1986 Act") to avoid the landlord's ability to determine a tenancy on the death of a 1986 Act tenant.

There is no statutory requirement for a tenant to disclose to a landlord that an assignment of the tenancy has taken place. So, in the absence of an express provision in a tenancy agreement, a tenant is not obliged to tell the landlord about an assignment.

The Case

The tenant farmer ("Farmer") had an oral tenancy in respect of approximately 20 acres of land in Gwynedd ("Holding"), protected by the 1986 Act ("Tenancy").

The "Original Landlord", the Claimant's predecessor, served a notice to quit dated 4 November 2019 ("Notice to Quit") on the Farmer seeking to terminate the Tenancy.

Unbeknown to the Original Landlord, the Farmer assigned the Tenancy to a company ("Company"), by a Deed dated 1 November 2019 ("Assignment"). The Assignment was not disclosed to the Original Landlord, before the Notice to Quit was served.

The Farmer is the sole director and sole shareholder of the Company. Following the Assignment, the Farmer carried on farming the Holding, but on behalf of the Company not on his own behalf, as he had done before the Assignment.

The issue that the Court had to determine was whether the Notice to Quit was valid, given that it was addressed to the Farmer and not the Company.

The law

The question of the validity of notices to quit served in such circumstances, has given rise to much litigation.

It is well trodden ground that a company is a separate legal entity from the individuals who sit behind its corporate veil. There is also authority that notice given to an assignor after a tenancy has been assigned will not constitute valid and effective notice.

"Reasonable recipient" test

In Thomas the Landlord relied on the "reasonable recipient" test, derived from the case of *Mannai*: Would it have been clear to a reasonable tenant reading the Notice to Quit that the Original Landlord was giving notice to quit the land and terminate the Tenancy?

The Landlord averred that in the absence of any other person appointed as secretary to the Company, the Farmer was the person responsible for the discharge of the Company's administrative functions and accordingly, fulfilled the role of company secretary. Further, the Farmer was the person responsible for the management and farming of the land.

Defending the claim, the Company emphasised that Section 93 (1) of the 1986 Act requires notice to be given or served on the person to or on whom it is to be given. The provisions in section 98 (1) relating to service on a company only arise if the notice is addressed and given to a company. It was not.

The Court held that any reasonable recipient of the Notice to Quit would appreciate that the Notice contained an error, in that it was addressed to the Farmer, not the Company. A reasonable person in the Farmer's shoes would appreciate the meaning that the Notice was intended to convey.

In the Judgment, reference was made, that it was the Farmer that had set up the Company and acted as its secretary. He assigned the Tenancy to the Company, but he continued to carry out the farming of the Holding. There was no material difference as to what was required of the Farmer, whether acting in his personal capacity or on behalf of the Company.

The Court may have reached a different conclusion had separate individuals been involved in the new limited company, rather than being the alter ego of the farmer himself.

Consequences

Whilst this is a County Court decision and thus not binding precedent, it will no doubt cause concern for tenants holding undisclosed assignments in their back pockets. The Judgment does not suggest that assignments to company vehicles will be invalid, but it does suggest that the Court is prepared to look behind the corporate veil, when considering the validity of notices to quit addressed to the wrong recipient.

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Cohabitation: How to protect the family farm

Over recent years, we have seen an increase in the number of couples living together but choosing not to get married. Most people are unaware of the potential legal implications of the actions they take (or don't take) in relation to their property and finances during their relationship.

Potential impact on the family farm

In farming families, succession plans are often in place for adult children gradually to take over the running of the farm. But no family is immune from relationship difficulties. Where property and land is an intrinsic part of family life and business, a separation within the family can have far-reaching implications, even (or especially) if the couple has not married.

Case study

John and Susan live together in the farmhouse on John's family's farm. John works on the farm with his parents and sister. They are all partners in the farm business. The farmland is owned by John's parents, who are gradually transferring land, property and some savings to John and his sister.

John and Susan are not married. A few years into their relationship they had children together, Emily and Jack.

Shortly before Emily was born, John and Susan moved into the farmhouse and John's parents moved into a smaller cottage on the farm. Susan used her only savings to fund an extension on the farmhouse and a refurbishment of the kitchen, which she also project managed. This significantly enhanced the value of the farmhouse. When the children started school, Susan began helping out with the farm accounts, and there had been talk of bringing her in to the partnership.

Sadly, John and Susan drifted apart and decided to separate. As John works long hours on the farm, they have agreed it makes sense for the children to spend most of their time with Susan. John had thought that it would all be ok as they weren't married, so he wouldn't have to share anything with Susan. John receives a letter from Susan's solicitor saying that she has an interest in the house on the farm because of her contribution over the years, and that she also needs housing for herself and the children, and she believes John has sufficient assets to pay for this.

Does Susan have a claim?

Susan could have a claim in respect of her interest in the house. If she was successful and the court found that she did have an interest, a judge would be able to order a sale of the property to realise that interest, under the Trusts of Land and Appointment of Trustees Act 1996 (TOLATA).

Susan may also have a claim on behalf of the children, under Schedule 1 to the Children Act 1989. This would be to ensure that the children's housing needs are met until they are 18 (or beyond in more unusual circumstances). This is usually by way of a loan from the other parent (John), to be returned once the children are 18.

Depending on available assets, she could potentially also claim for additional capital payments and school fees. John would also have to pay child maintenance.

This is a complex area of law. The court's decision can have a detrimental impact upon family-run businesses, especially farms. If John were forced to sell assets to realise cash to lend to Susan, this could damage the business and have an impact upon cash flow (neither of which are reasons for the court not to make an order).

The law around separation of unmarried couples is especially complex and can result in high legal fees if matters cannot be resolved out of court.

How to protect the farm

It is important that the family as a whole seeks good quality advice about asset protection and inter-generational wealth planning, to make sure first, that they are managing the farm in the most tax-efficient way and also to ensure that the farm is protected in the event of relationship breakdowns, whether after marriage or cohabitation, or if someone dies (Susan could have similar claims if John died). Considering the impact of relationship breakdown should also be a factor when restructuring takes place.

At present, very few families have proper discussions or record their intentions in writing, and so disputes arise when things go wrong.

For a farming family member who is thinking of moving in with someone, it would be worth having a cohabitation agreement, to ensure that your intentions are clearly set out and to try to avoid a dispute at a later stage.

The purpose of this would be to protect the farm assets and provide reassurance to the family as a whole as to what will happen if things go wrong.

The agreement could include:

- Conditions of the couple's occupation of a property;
- Terms of working on the farm, including remuneration;
- Future expectations; and
- What happens if the relationship ends.

Thought would need to be given around how any potential payment would be financed – whether by a sale of land or borrowing and it is worth doing this as part of planning generally, to ensure that any impact on the profitability of the business (and of course future viability) is kept to a minimum.

Another key time for seeking advice is if a couple are planning to marry. The law changes on marriage (and breakdown of marriage) and so again, where a farming business is concerned, it is important to understand the legal implications of getting married at the outset, so that provision and protection can be made to avoid any lasting damage to the farm if the marriage doesn't last. This could include entering into a premarital agreement (prenup).

If there is no cohabitation agreement in place and a separation is looking likely, it would be sensible to seek legal advice before, or as soon after, separation as possible.

This will hopefully ensure that it is handled in the most efficient way to protect the farm business, to establish a conciliatory approach from the outset and to aim to reach a resolution, without the need to refer matters to court.

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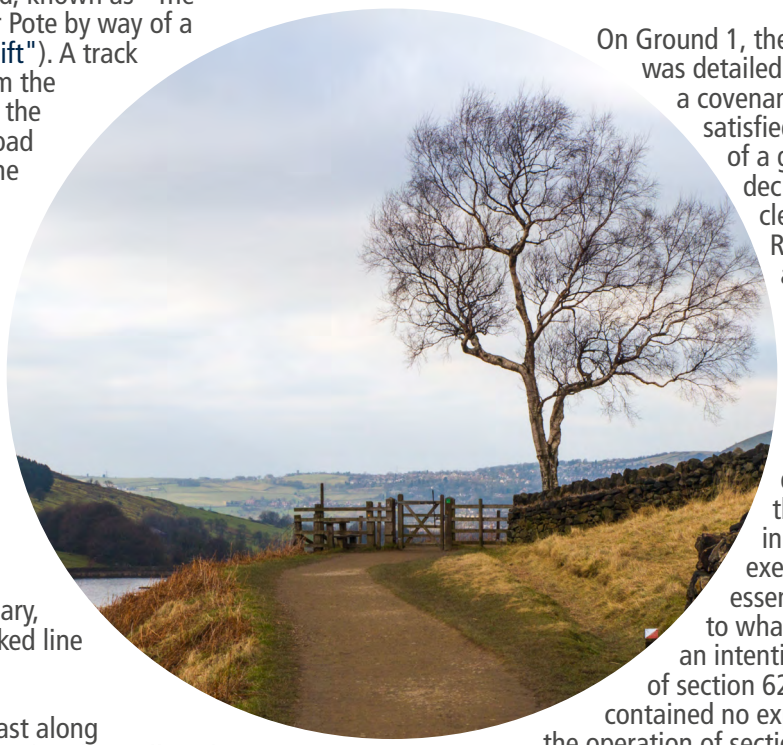
Rights of Way: Words required to establish a right

Rights of way are the source of countless disputes between landowners each year. In the recent case of *Browning v Jack* [2021] UKUT 307 (LC)] the Courts considered whether an easement was created in favour of a cottage and land over a farm track crossing neighbouring land.

The Facts

In 1994, Mr and Mrs Browning's ("Appellants") predecessor in title, Gerald Pote, purchased land near Saltash in Cornwall ("Land") by a conveyance ("1994 Conveyance"). The land comprised about 22 acres of pasture and was to the south of land belonging to June Jack and another ("Respondents"). It used to form part of the Respondents' property.

In 1995, a property on the Land, known as "The Cottage", was conveyed to Mr Pote by way of a Deed of Gift ("1995 Deed of Gift"). A track ran roughly north to south from the A38 on the southern border of the Appellants' land to Bethany Road on the northern boundary of the Respondents' land ("Brown Track").



In 2006, Peter Browning purchased the Land and the Cottage. The Appellants were in the habit of using the Brown Track to cross the Respondents' land to access Bethany Road.

The 1994 Conveyance contained a positive covenant obliging the Appellants to maintain and repair the boundary, hedges and fence along a marked line shown on an appended Plan.

This line ran roughly west to east along the boundary of the Respondents' and Appellants' respective land. A further covenant required the Appellants to construct a stock proof hedge or fence across the Brown Track should this ever be requested by the Respondents.

Issues under dispute

This appeal was brought by the Appellants to contest a decision made by the First Tier Tribunal that (a) the wording of the covenant in the 1994 Conveyance was inconsistent with an implied right of way over the Brown Track and (b) that the tribunal was wrong to look outside the terms of the 1995 Deed of Gift to find evidence to disapply the grant of an easement under section 62 Law of Property Act 1925.

Section 62

Under s62(1) a conveyance of land is deemed to include all easements enjoyed with the land at the time of the conveyance. However, this rule only applies if and as far as a contrary intention is not expressed in the conveyance (s62(4)).

The issues on appeal

The Upper Tribunal considered two legal issues on appeal:

- Ground 1: Could the rule in the case of Wheeldon v Burrows act to create an implied easement over the Brown Track in favour of the Land?
- Ground 2: Could the provisions in section 62 act to create an implied easement over the Brown Track in favour of the Cottage?

Decision

The Upper Tribunal allowed the appeal in part.

On Ground 1, the appeal was dismissed. There was detailed consideration as to whether a covenant to put up a fence could be satisfied through the construction of a gate. The Upper Tribunal decided that the wording was clearly phrased to allow the Respondents to cut off access along the track. Wheeldon v Burrow was therefore of no help to the Appellants in implying an easement in favour of the Land.

On Ground 2, the story was different. The Tribunal decided that an easement was implied in favour of the Cottage by the exercise of section 62(1). The essential point here came down to what could be held to constitute an intention to disapply the effect of section 62. The 1995 Deed of Gift contained no express provisions disapplying the operation of section 62.

The Respondents argued that surrounding circumstances could be taken into account (including the 1994 Conveyance) to demonstrate that section 62 was not to apply to the 1995 Deed of Gift. However, the Judge, determined that section 62(4) was clear in its requirement that express wording in the conveyance was required to disapply section 62. Surrounding circumstances could only be used as an aid to construing the words of a conveyance – circumstances were not in themselves enough to show a contrary intention in the absence of express wording.

The Judge determined that an easement over the Farm Track had been created for the use of the Cottage and that the Tribunal should give effect to the appellants' application to register the easement.

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Learning the Law: Using "Subject to Contract" appropriately

The term "Subject to contract" is used by parties when negotiating an agreement. When the parties use the term, they are saying that they do not intend to be bound to the agreement unless and until a formal contract is made. As a result, each party reserves the right to withdraw until such time as a binding, probably written, contract is made.

When the Law of Property Miscellaneous Provisions Act 1989 came into force, it imposed strict requirements on contracts involving the sale, or any disposition of interest, of land.

Specifically, section 2 implemented requirements that:

- Contracts may only be agreed in writing and must incorporate all of the terms in one document (or in each copy, where documents are exchanged.)
- The document incorporating the terms or, where contracts are exchanged, one of the documents incorporating them (but not necessarily the same one) must be signed by or on behalf of each party to the contract.

As a result of the legislation, the use of "subject to contract" became largely redundant in land transaction negotiations, although it is still commonly seen on agents' sale boards.

Subject to contract has continued to be used, however, in negotiations which do not involve the disposition of an interest in land. As demonstrated in a recent Court of Appeal decision, parties negotiating an arrangement need to think carefully at each stage, whether in fact they intend the negotiations to be binding or not.

Joanne Properties Ltd v Moneything Capital Ltd

In the case of *Joanne Properties v Moneything Ltd* [2020], the Claimant had a loan from the Respondent, secured by a legal charge over the property. The parties fell into dispute but managed to settle by agreeing that the property would be sold, with £140,000 being ring-fenced to split between them. The parties then conducted negotiations as to how the £140,000 was to be split. The solicitor for Moneything first introduced the "subject to contract" label in negotiations, which was communicated to Joanne Properties' solicitor. They then put forward a formal offer on a "without prejudice save as to costs basis". This offer was not accepted.

Joanne's subsequent offer was headed "without prejudice and subject to contract". There were further "subject to contract" negotiations, which resulted in an agreement over the figure which would be paid to Moneything. However, the mechanics of the payment were not agreed.

Joanne subsequently changed solicitors, after which Moneything made another offer on a 'without prejudice and subject to contract' basis. This was accepted by Joanne. However, Joanne then refused to sign a consent order which would incorporate the terms of the proposed settlement.

Moneything therefore applied for an order declaring the proceedings to have been settled by the email correspondence.

When the matter came before the Court of Appeal, it was held that as the "subject to contract" label was not dropped from the offer, the negotiations were only included to the same extent and that a formal contract, in this case a signed consent order, was required for the agreement to be binding.

The case is a stark reminder that for transactions not relating to land, which do not enjoy the same requirements that land contracts do under section 2, subject to contract is a label that needs to be used carefully. Once implemented, it protects the parties from accidentally reaching an agreement, and carries through the negotiations.

However, it is a double-edged sword, and parties must ensure that when making an agreement that is intended to be binding, they make clear that the agreement is no longer subject to contract.

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The Early Spring 2022 Quiz

As we approach Lady Day, the quiz this quarter is all about surrenders.

1. True or False - it is not possible to surrender a tenancy unless the tenant executes a deed of surrender?

2. Which of the following is the correct answer to this question – does a subtenancy survive the surrender of a head tenancy where the head tenancy is protected by the Agricultural Holdings Act 1986?

   a) No – a subtenancy is carved out of the head tenancy so it stands or falls with the head tenancy.
   b) Yes – a subtenancy survives a surrender of the head tenancy
   c) Maybe – it depends on whether the sub tenancy is protected by the Landlord and Tenant Act 1954 or is a farm business tenancy.

3. True or False – a surrender by one of joint tenants will end the tenancy?

4. If a tenant executes a deed of surrender and surrenders his tenancy is he automatically released from all breaches of covenant?

   a) Yes – once the deed is completed, there is no going back to examine the history of the landlord/tenant relationship
   b) No – in the absence of an express release the tenant is only released from liability for future performance of covenants.
   c) No – the tenant can only be released from past breaches of covenant once the deed of surrender is registered.

Please email your answers to: adam.corbin@michelmores.com by Friday 15 April 2022.

Everyone who submits the correct answers will be included in a prize draw to win a bottle of sparkling wine.

The answers will be provided and the winners announced in the next edition. Good luck!

Answers to Autumn 2021 Quiz

Last quarter the quiz was about compulsory purchase and the winner was Jonathan Scott-Smith of Knight Frank. Jonathan will receive a bottle of English sparkling wine for his efforts.

Here are the answers to the questions set last quarter:

1 Agent, legal, and professional fees incurred by a claimant in taking advice upon the acquisition are recoverable from the acquiring authority because:

a) that is what s. 23 of the Compulsory Purchase Act 1965 provides;
b) the common law has always recognised these fees as a valid head of loss; or
c) it is covered by the six rules of compensation at s.5 of the Land Compensation Act 1961.

Answer: b. s.23 covers conveyancing fees, and it is widely accepted that the 6 rules do not specifically allow this head of claim, whereas since well before the 1961 and 1965 Acts the Courts have recognised this head of claim.

2 True or false, annual periodic business tenants are not entitled to compensation for losing their tenancy upon entry?

Answer: False. S. 47 of the Land Compensation Act 1973 specifically provides that security under Part II of the Landlord and Tenant Act 1954 is to be taken into account in assessing compensation.

3 True or false, the costs of applying for a Certificate of Appropriate Alternative Development are recoverable from the acquiring authority?

Answer: True. See also: *Leech Homes v Northumberland CC* [2020] UKUT 328 (LC) and [2021] EWCA Civ 198 where the Court of Appeal has found that the Tribunal's power to award costs against an unsuccessful party under Tribunal Rule 10 is limited to "compensation for compulsory purchase", so not costs in CAAD appeals.

4 An acquiring authority does not need to serve notices upon those with the benefit of easements over acquired land, but does it have to compensate those who lose the benefit of such an interest as a result of the construction or use of the scheme?

a) yes;
b) no; or
c) only if the right is permanently extinguished.

Answer: Yes. S. 10 of the Compulsory Purchase Act 1965 provides for it, and note it is not possible to enforce such a right as against the acquiring authority provided that the use is authorised by statute (*Long Eaton Rec. Gnd Co. v Midland Ry* [1902]. If the disturbance is temporary, there is no reason why those affected should not recover their loss. Where no compensation is paid and ownership is then passed to a third party from the acquiring authority, the easement will be once again enforceable.

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